UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STATION GVR ACQUISITION, LLC D/B/A
GREEN VALLEY RANCH RESORT SPA CASINO

and **Case 28-CA-224209**

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS
A/W UNITE HERE INTERNATIONAL UNION

EMPLOYER'S REPONSE TO MOTION FOR SUMMARY JUDGMENT AND NOTICE TO SHOW CAUSE

Pursuant to National Labor Relations Board ("Board") Rule 102.24(b) and the Notice to Show Cause issued by the Board on August 24, 2018, and within the time called for in the Notice to Show Cause, Respondent Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino ("GVR" or "Employer") hereby responds to the Motion to Transfer and Continue Matter Before the Board and for Summary Judgment ("Motion") filed by the General Counsel for the National Labor Relations Board.

I. INTRODUCTION

GVR admits that it is refusing to bargain with the Local Joint Executive Board of Las Vegas a/w UNITE HERE International Union ("Union") because the underlying election was tainted by egregious Union misconduct. The Union admitted that it directed bargaining unit employees to "sign up" to vote on Union-prepared "Election Day Sign Up Sheets"; directed its "special agents" within the bargaining unit (called "Committee Leaders") to question other bargaining unit employees as to whether they had voted; and directed the Committee Leaders to report back to the Union who had and had not voted. The Union compiled the information reported by the Committee Leaders into an electronic database (*i.e.*, a "list"). On the first day of a two-day election, the Union used this electronic list to target bargaining unit employees who had not voted for additional

phone calls or house visits by the Union, creating the unmistakable and accurate impression that the Union knew they had not voted.

Despite these facts, the Regional Director certified the Union. In denying the Employer's subsequent Request for Review, the Board held that: (1) the Employer "failed to prove that *any* employees knew *or would have reasonably inferred* that the Petitioner had made a list of employees who had not yet voted in the election"; and (2) the Union's actions were in response to information that employees voluntarily provided, and therefore could not give rise to an impression of surveillance. (GCX 25 (emphasis added)).

These conclusions were and are unsupported by the facts or the law. First, to hold that a party may monitor, track, and compile information about who has and has not voted, with the knowledge of bargaining unit employees, so long as the bargaining unit employees are not aware of the ministerial act of compiling that information into a "list," exalts form over substance and is unsupported by Board law. Second, that employees who were directed by the Union to question other employees as to their voting activities, and to secretly report that information back to the Union, would *reasonably* infer that the Union was actually using that information is not only a "rational connection," but an inescapable conclusion. Third, that the employees "voluntarily" provided this information (after previously enduring repeated, aggressive harassment by the Union and its Committee Leaders) is irrelevant, because monitoring the voting activities of bargaining unit employees is *per se* objectionable regardless of whether any employee was subjectively coerced. Finally, although squarely raised in the Employer's Request

for Review, the Board entirely failed to address why the oral lists of who had and had not voted that were compiled by the Committee Leaders were not objectionable "lists."

While these issues were raised and litigated in the underlying representation proceeding, the Regional Director's and the Board's conclusions were without factual or legal support and the Board should take this opportunity to fully address these issues prior to review by a federal appellate court.

II. STATEMENT OF THE CASE

A. Pre-Election Background and Special Agent Status

"Pursuant to a Stipulated Election Agreement, an election was conducted on November 8 and 9, 2017 in a unit of certain of the Employer's hotel, resort, and casino employees ('team members')." (GCX 22 ("Certification Decision") at p. 1.) Prior to the election, the Union "organized an in-plant organizing committee comprised of . . . employees of the Employer, whose members were known as committee leaders." (GCX 15 ("HO Report") at p. 5.) "The Committee Leaders wore a union button that displayed the union logo and the words 'committee leader.'" (*Id.*) "From about June 2017 to the election," the number of Committee Leaders "increased from about 50 Committee Leaders to about 60-70 Committee Leaders." (*Id.*)

"The Committee Leaders were much involved in Petitioner's organizing efforts." (*Id.*) In particular, "during the critical period preceding the election, the Petitioner created and made use of 'Election Day Sign Up' sheets. These contained a list of names and contact information of employees the Petitioner had determined were likely to vote for the union opposite a grid with the polling dates and times." (Certification Decision at p. 5.) The sheets "targeted approximately 568 team members whom the Petitioner

believed would vote for the Petitioner." (HO Report at p. 9.) The Union "distributed sign-up sheets to approximately 60-70 Committee Leaders." (*Id.* at p. 10.) "For the most part, each Committee Leader received a sign-up sheet with a unique list of team members [and their contact information]." (*Id.*) The Committee Leaders were "instructed [by the Union] to contact the team members on their list and get the team members to commit to vote on a certain date and time." (HO Report at pp. 5, 10.)

"The record establishes that Committee Leaders followed the [Union's] instructions." (*Id.* at p. 10.) Specifically, the "evidence . . . shows that Committee Leaders did, at the Petitioner's instruction, ask team members on sheets assigned to them whether and when they intended to vote, and reported this information to union organizers . . . ." (Certification Decision at p. 5.) The Hearing Officer and Regional Director correctly determined that the Union had "endowed committee leaders with actual authority" and that the "Committee Leaders were special agents of the Petitioner for purposes of polling team members regarding whether or when they intended to vote, and to report that information back to the Petitioner, using the sign-up sheets created by the Petitioner for that purpose." (*Id.* at p. 13; Certification Decision at p. 6.)

B. Election Day Misconduct

On the days of the election, the Union "instructed committee members to ask [the employees on their Sign Up sheets] if they had voted." (HO Report at p. 24.) The Union further "instructed Committee Leaders to report to them who on their sign-up sheets had voted." (*Id.*) "The record establishes that the Committee Leaders did just that." (*Id.*)

Specifically, "during the election, Committee Leaders did observe and make some verbal reports to Petitioner's organizers that certain team members had voted, or at least

told Committee Leaders that they had voted." (Certification Decision at p. 11.) The "Committee Leaders told the Petitioner what they had learned and that the Petitioner electronically recorded the information." (*Id.*) "This 'data,' which for all intents and purposes was an active list of those who had voted, was stored electronically at the Petitioner's office . . . ." (HO Report p. 24.) "Petitioner used [this list] to determine which of [its] likely supporters had not yet voted, and then directed 'get out the vote' efforts toward those voters, including calling them to remind them to vote." (Certification Decision at p. 11.)

C. Post-Election Proceedings

Despite the undisputed facts above, the Hearing Officer and Regional Director concluded that the Union's conduct was not objectionable and certified the Union. The Employer requested review on three grounds: (1) the oral lists prepared, compiled, and transmitted by bargaining unit employees were themselves objectionable "lists"; (2) the Union created the (accurate) impression that it was monitoring and tracking whether employees had voted; and (3) bargaining unit employees would have *reasonably* inferred the existence of the list. (GCX 23.) On July 18, 2018, the Board issued an unpublished order denying the Employer's Request for Review on two grounds: (1) the Employer "failed to prove that any employees knew or would have reasonably inferred that the Petitioner had made a list of employees who had not yet voted in the election"; and (2) "because all of the Petitioner's actions were in response to information that employees voluntarily provided to it . . . , this conduct could not reasonably give rise to an impression of surveillance." (GCX 25.) Although squarely raised at every stage of

briefing, neither the Regional Director nor the Board has ever addressed why the oral lists prepared and transmitted by the Committee Leaders were not themselves objectionable.

Because the certification of the Union is legally and factually baseless, the Employer has engaged in a technical refusal to bargain with the Union in order to test the underlying certification. On July 23, 2018, the Union filed a charge alleging that the Employer refused to recognize and bargain with it. (GCX 26.) The Acting Regional Director for Region 28 issued a complaint based on the charge and the Employer filed an Answer admitting that it was refusing to bargain because the Union was improperly certified (GCXs 28, 30.) The General Counsel moved to transfer the matter to the Board and for partial summary judgment, and the Board issued a Notice to Show Cause on August 24, 2018.

III. ARGUMENT

The keeping of a voter list is *per se* objectionable and grounds for setting aside the election "when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *See generally Days Inn Mgmt. Co.*, 299 N.L.R.B. 735, 737 (1990). There is no requirement that the objecting party demonstrate an "actual interference with the voters' free choice." *Id.* As always, whether conduct is objectionable is not based upon the subjective impressions or testimony of employees, but rather that of an objectively reasonable voter. *Lake Mary Health Care Assocs., LLC*, 345 N.L.R.B. 544, 547 fn.3 (2005) ("[W]hether a [party] intends its conduct to interfere with an election or whether the conduct actually affected the election are irrelevant because the test is an objective one viewed from the standpoint of a reasonable employee.").

A. The Oral Lists Were Objectionable

As set forth above, it is undisputed that the Committee Leaders – who are themselves bargaining unit team members – observed and questioned the team members assigned to them on their "Sign Up" sheets as to whether they had voted and then reported back to the Union on which employees had and had not voted. Put simply, a compilation of employees who have and have not voted is a "list," even if it comprises less than the entire bargaining unit.

Because the Board failed to offer any explanation for why these lists were not objectionable, the Employer can only speculate. One potential rationale is that because the lists were oral rather than written, they would not convey the impression of surveillance to team members. *Cf. Medical Cntr. for Beaver Cnty.*, 716 F.2d 995, 1000 (3rd Cir. 1983) (finding "abundant circumstantial evidence" to support that team members were aware of list-keeping where party checked off names near entrance). But that rationale makes no sense in the context of this case, where bargaining unit employees were themselves creating the lists and therefore indisputably aware of them.

Another possibility is that the Board implicitly concluded that partial list-keeping is not objectionable. But both the Board and the Regional Director's analysis implicitly acknowledge that if bargaining unit employees were aware of the electronic "list" being maintained by the Union (which also did not include the entire bargaining unit) the list-keeping would be objectionable. Moreover, the Employer is aware of no authority, and the Board cited none, holding that partial list-keeping is permissible, particularly where, as here, 60-70 bargaining unit employees are actively engaged in the list-keeping.

A final possibility is that employees *other* than the Committee Leaders were not aware of the oral lists, and the Committee Leaders participated in and consented to the list-keeping, and so no bargaining unit employee was actually coerced. But as set forth above, once a party establishes that eligible voters were aware of the list-keeping, whether any voter was actually subjectively coerced is irrelevant. *Days Inn*, 299 N.L.R.B. at 737. And here there was indisputably voter knowledge, because eligible voters were the ones preparing the lists. Accordingly, even absent any additional Union conduct associated with the lists, the oral voter lists prepared and submitted by the Committee Leaders were objectionable and grounds to set aside the election.

B. The Union Created An (Accurate) Impression of Surveillance

In denying the Employer's Request for Review, the Board concluded that the Union's activities could not have created an impression of surveillance because employees voluntarily provided the information on whether they had or had not voted to the Union. Nonsense. First, as the Regional Director acknowledged, some of the information was gathered through the "observation" (*i.e.*, surveillance) of whether team members had voted. (Certification Decision at p. 11.) Second, employees did not volunteer this information to the Union – they provided it only under direct questioning by known Union agents, many of whom had previously engaged in coercive and persistent harassment of employees to pressure them into supporting the Union. *Masonic Homes of Cali., Inc.*, 258 N.L.R.B. 41, 48 (1981) ("[E]mployees must be permitted to cast their ballots in secret, in complete freedom, and without fear of reprisal or discipline. Activity that reasonably can be construed as improper is proscribed, whether or not the activity is, in fact, improper."). Third, the employees that were

contacted at their homes because they had *not* voted did not volunteer any information to the Union – they were specifically targeted because they had *not* informed a Committee Leader that they had voted. These employees were unquestionably left with the (correct) impression that their voting activities were not secret and were being monitored and tracked by the Union.

To hold that a party may monitor, track, and compile information on who has and has not voted – with the knowledge of bargaining unit team members – so long as employees are not aware of the ministerial act of creating a "list" out of such information exalts form over substance and is inconsistent with Board law. *See Hydro-Aire Div., Crane Co.*, 281 N.L.R.B. 979, 980 (1986) (test is whether party's action would "reasonably tend to create an impression of surveillance"). It is the impression given to voters that their voting activities are being monitored and tracked – not the list-keeping itself – that is *per se* objectionable and mandates that the election be set aside. *See Med. Ctr. of Beaver Cty., Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983) ("In the interest of ensuring free, non-coerced elections, the Board has set aside elections if employee voters know, or reasonably can infer, that their names are being recorded on unauthorized lists. Absent such knowledge or interference on the part of voters, any list-keeping activity, although technically prohibited, obviously could not interfere with the exercise of voter free choice . . . ."); *see also Days Inn*, 299 N.L.R.B. at 736 ("The keeping of any other list of individuals who have voted is prohibited and is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded.").

C. Voters Reasonably Inferred The Existence Of The List

The Board also denied review on the grounds that voters did not know and would not have *reasonably* inferred the existence of the electronic list being kept by the Union (they were unquestionably aware of the partial lists being kept by the Committee Leaders). That conclusion, too, was baseless. "The fundamental test [in deciding whether to draw an inference] is whether there is a rational connection between the facts proved and the fact that is to be inferred." *NLRB v. Wal-Mart Stores, Inc*., 488 F.2d 114, 117 (8th Cir. 1973). As Board law makes clear in a variety of contexts – including, for example, campaign literature – the Board has great respect for employees. *See Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 60 (1966) ("Board has given wide latitude to competing parties in a labor dispute and does not 'police or censor propaganda,' but 'leaves to the good sense of the voters the appraisal of such matters'"); *see e.g., NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964) (employees will not miss the inferences of promises of benefits or threats of reprisals in campaign speeches); *Christie Elec. Corp.*, 284 N.L.R.B. 740, 755 (1987) (legality of [a party's] remarks often depends on nuances of phrasing...because employees are notoriously and understandably sensitive to anything resembling a suggestion of retaliation"); *see also Fisher Governor Co.*, 71 NLRB 1291, 1300 (1946) (employees are "sensitive to overt or subtle communications of hostility"). "Workingmen do not lack capacity for making rational connections." *Thomas v. Collins*, 3232 U.S. 516, 535 (1945)

Here, at least two groups of employees would have reasonably inferred the existence of a "list." First, the Committee Leaders. The facts known to the Committee Leaders were: (a) the Union invested considerable time and effort to prepare the "Sign

Up" sheets and obtain the specific dates and times employees intended to vote; (b) on the day of the election, the Committee Leaders were expressly directed to question employees as to whether they had voted; (c) they were expressly directed to report this information back to the Union; and (d) they did so in secret, out of view of other voters. No rational employee would assume the Union went through this time and expense for no reason; rather a rational employee would assume the Union intended to use the information it went to great pains to collect.

Second, the employees who were targeted for additional solicitation because they had not voted. The facts known to those team members were: (a) a Union "special agent" asked them to identify the specific date and time they intended to vote; (b) on the day of the election, that same Union special agent asked them if they had not voted; (c) they informed the Union special agent that they had not voted; and then (d) they received a phone call or house visit from the Union later than night urging them to vote. *See generally Marathon Le Tourneau Co.*, 208 N.L.R.B. 213, 223-24 (1974) (party engaged in objectionable conduct where it maintained list of employees who had and had not voted, particularly where there were multiple voting session and the party "had the opportunity to convert that list to its own use"), *enf'd*, 498 F.2d 1400 (5th Cir. 1974); *Piggly-Wiggly #011*, 168 N.L.R.B. 792, 792 n.2 (1967) (finding list-keeping objectionable, and noting the allegation that the list was used to contact employees who had not voted to urge them to vote in the election). To hold that employees would not have been able to "connect the dots" in these circumstances attributes an unwarranted and insulting degree of naiveté and ignorance to employees that is inconsistent with Board

law in all other contexts. Consequently, the Board erred in concluding that employees would not have reasonably inferred the existence of the list.

IV. CONCLUSION

For the reasons set forth above, the Board should deny the Motion for Summary Judgement and vacate the underlying certification.

Respectfully Submitted,

Date: September 5, 2018

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CERTIFICATE OF SERVICE

I hereby certify this 5th day of September, 2018, that a copy of the Employer's Response to Motion for Summary Judgment and Notice to Show Cause was electronically served on:

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